Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

FRED KRATT,

Petitioner,

v

UNITED STATES OF AMERICA,

Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court held that the term "proceeds" as used in the context of the Federal Money Laundering Statute (**18 U.S.C. § 1956**) means "profits" ***United States v. Santos*** Should the United States Supreme Court grant Certiorari because the Sixth Circuit Court Of Appeals erred when it entered its decision in conflict with this Court and other United States Courts of Appeal, holding in ***Kratt***: that the term "proceeds," as used in the Federal Money Laundering Statutes, means "profits" in some situations, but for Kratt, "gross receipts," violating this Court's holding in ***Clark v. Martinez***, which holds the meaning of words in a statute cannot change with the statute's application?

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OPINION BELOW

The Sixth Circuit Court of Appeals summarized the issue raised on Appeal as follows:

> The question raised by Kratt's Appeal is this: does "**proceeds**" mean **profits** or **gross receipts**? Put another way, did the Government have to establish the **gross receipts** Kratt received from the fraudulently obtained loans (viz., the full $301,535.00 amount of the loans and the resulting $274,712.48 and $25,287.52 deposits) or did it have to establish **the profits** Kratt received from the fraudulently obtained loans (viz , the **net profits** from the loan and the deposits)? If "**proceeds**" means **profits**, as Kratt argues, the Government has a **sufficiency-of-the-evidence** problem, because it never proved that the money Kratt deposited into, and withdrew from, his Bancorp South account represented the **profits**, as opposed to the **gross receipts**, of his bank fraud or false statements. If "**proceeds**" means **gross receipts**, as the Government argues, Kratt does not have a leg to stand on in challenging these convictions on sufficiency grounds

***Kratt*, 579 F.3d at 559**. The Sixth Circuit went on to hold that:

> "**[P]roceeds**" does not always mean **profits** as Justice Scalia concluded; it means only when the § 1956 predicate offense creates a **merger** problem that leads to a **radical increase** in the **statutory maximum** sentence

> and only when nothing in the legislative history suggests that Congress intended such an increase **Id. at 562.** (alteration in original)
>
> Because Kratt's § 1957 conviction **does not subject him to a markedly increased statutory maximum**, there is no need to consider whether the legislative history shows that Congress contemplated, and intended, such an outcome **Id. at 563.**
>
> ***Santos*** thus does not require us to apply a "**profits**" definition of "**proceeds**" to Kratt's offenses. That leaves us with our prior precedents in this area, which apply a "**gross receipts**" definition. **Id. at 563.**

Consequently, the Sixth Circuit's decision in ***Kratt*** necessarily held that there are **two different meanings** of the term "**proceeds**," contrary to this Court's controlling precedent in ***Clark v. Martinez***

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under **28 U.S.C. § 1254(1).**

This Petition was timely filed pursuant to Justice Stevens' March 11, 2010 deadline in his Extension Order **(Docket at 09A626).**

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following Constitutional provision, the pertinent portion of which is set forth as follows

> "No person shall be ... deprived of life, liberty, or property, without due process of law.

U.S. Constitution, Amendment V.

This case also involves the following statutory provisions, the pertinent portions of which are set forth as follows

18 U.S.C. § 1956

18 U.S.C. § 1957

18 U.S.C. § 1014

18 U.S.C. § 1344

18 U.S.S.G. § 2S

STATEMENT OF CASE

The Sixth Circuit Court of Appeals summarized the facts in this case as follows:

> In June 2001, Kratt re-financed his Cessna airplane by obtaining a $301,535 00 loan from Bancorp South based on fraudulent income tax returns that inflated his adjusted gross income for 1999 and 2000.

The bank received a security interest in Kratt's Cessna as collateral. When Kratt fell behind on his payments, the bank foreclosed on the plane, selling it for $210,700.00 in October 2003. The sale left an $86,137.00 deficiency on the loan. On December 29, 2003, Kratt obtained an unsecured loan from Bancorp South for $86,137.00, which the bank applied to the first loan two days later. That brought the first loan to a zero balance and allowed Bancorp South to release its security interest in the Cessna.

Kratt did little better paying off the second loan He made six payments between March and August 2004, only one of which (for $1,546.00) made any dent in the principal. Bancorp South charged off the second loan in August 2004, which had a final balance of $85,945 00. Kratt declared bankruptcy in 2005 and discharged his debts, transforming the final loan balance into a permanent loss for the bank

Kratt, 579 F.3d at 558

ARGUMENT

THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN HOLDING THE TERM "PROCEEDS," AS USED IN THE FEDERAL MONEY LAUNDERING STATUTES, HAS DIFFERENT MEANINGS DEPENDING ON THE STATUTE'S APPLICATION, VIOLATING THIS COURT'S HOLDING IN *CLARK v. MARTINEZ*, 543 U.S. 371 (2005). THE SIXTH CIRCUIT'S OPINION CONFLICTS WITH AT LEAST SIX OTHER CIRCUITS AS TO THE MEANING OF THE TERM "PROCEEDS." THESE COURTS ARE FURTHER DIVIDED INTO AT LEAST THREE DISTINCT GROUPS OVER THAT SAME IMPORTANT ISSUE.

A. To Give More Than One Meaning To The Term "Proceeds," "Profits" For One Offense And "Gross Receipts" For Another, Violates This Court's Holding In *Clark v. Martinez*.

The record is clear that the three money laundering convictions in the case sub judice did not involve the element of "**profits**" required to uphold the three money laundering convictions. The Government did not present to the jury the question of "**profits**." The court also found that under at least one definition of "**profits**," **the Petitioner could not have profited**. As Judge Sutton wrote:

> The second answer is that the Government did nothing to prove to the jury that the deposits and withdrawl represented the **profits** of Kratt's crimes and of course the

> jury was never instructed on the point. We cannot relieve the Government of its burden of proof on an essential element of a crime whenever we believe it might satisfy it **Cf. *United States v. Gaudin*, 515 U.S. 506, 510, 514-15 (1995).**
>
> [T]he definition of **profits** is far from self-evident . . . [T]he **gross receipts** of the loan minus the value of the security interest at the time of the loan . . **[U]nder that definition Kratt obtained no profit from the loan.** He received a $301,535.00 loan but gave the bank a $301,535 00 security interest in a Cessna valued at $350,000 00 **Id. at 564.**

The lower Court held in ***Kratt***, that the holding in ***United States v. Santos*, supra** is: (i) the term "**proceeds**," as used in the federal money laundering statutes, means "**profits**" when the § 1956 predicate offense creates a **merger problem that leads to a radical increase in the sentence. The Court further limited the radical increase to only those sentences increased as a result of statutory maximums**; and (ii) only when nothing in the legislative history suggests that Congress intended such an increase.[1]

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[1] Petitioner submits this logic is flawed The Court based its perverse merger requirement solely on cases where statutory maximums are much higher for the money laundering, than for the underlying offense This is **NOT** what Justice Stevens said Justice Stevens said it was particularly unfair in ***Santos***

(Continued on following page)

The Petitioner submits that the Court of Appeals erred when it found the term "**proceeds**" meant "**gross receipts**" for Kraft, and further that the term "**proceeds**" has a different meaning, i.e.,

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because the "**penalties**" were "**substantially**" more severe for money laundering This statement encompasses not only statutory "maximum" penalties, but also sentences based on Guidelines ranges as well Justice Stevens wrote

> Allowing the government to treat the mere payment of the expense of operating an illegal gambling business as a separate offense is in practical effect, tantamount to double jeopardy, which is particularly unfair in this case because the penalties for money laundering are substantially more severe than those for the underlying offense of operating a gambling business A money laundering conviction increases the statutory maximum from five (5) to twenty (20) years, and the Sentencing Commission has prescribed different Guideline ranges for the two crimes

Justice Stevens was clearly concerned about all sides of the sentencing result The sentence could have been originally based on the Guidelines, or the statutory maximum, either one The perverse sentencing penalties were not limited to solely statutory maximums

In this case, after the grouping of counts, the offense level without the money laundering, as determined by the USSG Guideline Manual was a seven (7)

After adding the money laundering, the offense level increased to a level twenty-one (21)

Applying a Criminal History of III to this case, the sentencing range was four to ten (4-10) months for the level seven (7), and forty-six to fifty-seven (46-57) months for the level twenty-one (21)

This Petitioner was sentenced to forty-six (46) months imprisonment

"**profits receipts**," depending on the application of the money laundering statutes Such a holding disregards this Court's controlling precedent in ***Clark v. Martinez*, 543 U.S. 371 (2005).**

As Justice Scalia explicitly points out in his ***Santos*** opinion, just three years earlier, the Court forcefully held in its ***Clark v. Martinez*** decision that, **"the meaning of the words in a statute cannot change with the statute's application."** ***Santos*, 128 S. Ct. at 2030.** Justice Scalia writes:

> ***Clark v. Martinez*, 543 U.S. 371 (2005)**, held that the meaning of words in a statute cannot change with the statute's application. **See Id. at 378.** To hold otherwise "would render every statute a chameleon," **Id. at 382**, and "would establish within our jurisprudence .. the dangerous principle that judges can give the same statutory text different meanings in different cases," **Id. at 386**. Precisely to avoid that result, our cases often "give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation The lowest common denominator, as it were, must govern. **Id. at 380 (emphasis added).**

Santos*, 128 S. Ct. at 2030.** Justice Alito, in his ***Santos dissent, **128 S. Ct. at 2045**, clearly reaffirmed the legal impact of this holding in the money laundering context when he stated that, **"[T]he meaning of the term 'proceeds' cannot vary**

from one money laundering case to the next, and the plurality and Justice Stevens inappropriately allows the interpretation of that term to be controlled by a problem that may arise in only a subset of cases." **In other words, because the plurality and Justice Stevens have now defined "proceeds" as "profits" in at least one application of the money laundering statutes – Mr. Santos' illegal gambling case – *Clark v. Martinez* now requires that "proceeds" means "profits" in all money laundering cases.**[2]

The Court of Appeals disregarded Justice Scalia's expressed warnings to counsel, when it concluded, based upon Justice Stevens' narrow holding in ***Santos***, the term "**proceeds**" means "**gross receipts**" instead of "**profits**" in some applications of the money laundering statutes. Justice Scalia warned:

> [T]he narrowness of [Justice Stevens'] ground consists of finding that "**proceeds**" means "**profits**" when there is no legislative history to the contrary. That is all our judgment holds It does not hold that the outcome is different when a contrary legislative history does exist Justice Stevens'

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[2] In ***Spector v. Norwegian Cruise Line*, 545 U.S. 119, 140 (2005)**, this Court reaffirmed that "***Martinez*** held that statutory language given a limiting construction in one context must be interpreted consistently in other contexts, even though other of the statutory applications, standing alone, would not support the same limitation, [T]his was simply a rule of consistent interpretation of statutory words "

> speculations on that point addresses a case that is not before him, are the purest of dicta, and form no part of today's holding. Thus, as far as this particular statute is concerned, counsel remain free to argue Justice Stevens' view (and to explain why it does not overrule ***Clark v. Martinez*, supra**). **They should be warned, however: Not only do the Justices joining this opinion reject that view, but so also (apparently) do the Justices joining the principal dissent. Id. at 2031 (emphasis added).**

Santos*, 128 S. Ct. at 2031.** In fact, not only did Justice Alito's principal dissent, **128 S. Ct. at 2045**, confirm that all four of the Justices who joined it agree that the meaning of "**proceeds**" cannot vary from one money laundering case to the next, this Court's subsequent unanimous decision to GVR (Grant, Vacate and Remand) a fraud case, ***Moreland v. United States*, 129 S. Ct. 997 (2009)**, "in light of ***Santos . . . " indicates that all of the Justices now apparently share that view.

The Sixth Circuit Court of Appeals' decision in the case sub judice disregards, and apparently attempts to overrule U.S. Supreme Court controlling precedent established in ***Clark v. Martinez*. Because *Santos* defines "proceeds" as "profits" in at least one application of the money laundering statutes, *Clark v. Martinez* necessarily requires that the same "profits" definition be used in every other application thereof.**

The Petitioner submits that. (i) the Sixth Circuit Court of Appeals lacks the authority to disregard or overrule ***Clark v. Martinez*** regardless of its *stare decisis* analysis of the plurality decision in ***Santos***; and (ii) that ***Clark v. Martinez*** remains binding upon the Sixth Circuit Court of Appeals, and ALL other lower courts, until such time as this Court itself sees fit to directly overrule – something it indisputably has not done. **See *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982)** ("More importantly, however, the Court of Appeals could be viewed as having ignored, consciously or unconsciously, the hierarchy of the federal court system created by the Constitution and Congress . . Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be.") **See also *Hohn v. United States*, 524 U.S. 236, 252-53 (1998)** ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality") ***Agnosti v. Felton*, 521 U.S. 203, 237 (1997)** ("We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent"), ***Rodriguez de Quijas v. Shearon/American Express, Inc.*, 490 U.S. 477, 484 (1989)** ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the

case which directly controls, leaving this Court the prerogative of overruling its own decisions.").

B. The Government Has Testified That "Proceeds" Means "Profits."

On February 11, 2009, three weeks after the ***Moreland*** GVR, Acting Assistant United States Attorney General Rita Glavin testified before the Senate Judiciary Committee and stated that the 2008 Supreme Court decision in ***Santos*** "effectively limited the money laundering statute to profitable crimes." **CLR, Vol. 84 No. 20, 552, February 18, 2009.** She further testified that:

> Prior to ***Santos***, a mortgage fraudster's kickback to a corrupt appraiser for inflating the value of a home could be charged as a money laundering transaction, and could provide a legal basis for seizing the transferred money and eventually returning it to the fraud victims. Under ***Santos***, a court could conclude that the payment constituted an expense of the fraud scheme and it therefore could not be charged as "money laundering."

Id. The Acting Assistant United States Attorney General's congressional testimony can only be read to concede that ***Santos'*** definition of "**proceeds**" applies to fraud cases.

C. The Fraud Enforcement And Recovery Act (FERA) Of 2009.

The Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21(f)(1), (2), (3), 123 Stat 1617, was signed into law on May 20, 2009, amending the definition of "proceeds" in 18 U.S.C. § 1956(c)(9), to now include "**gross receipts**." Applying that rule of statutory construction to (FERA), since Congress had amended the definition of "specified unlawful activity" and "**proceeds**" to now have different meanings which includes "**gross receipts**," these definitions in the pre-amendment money laundering statutes necessarily could not have included "gross receipts" before.

As explained above, "It is a familiar role of construction that a change in language necessarily implies a change of intent. Congress changed the language, thereby departing from its prior suspension of the right to the allowance." ***United States v. Dickerson*, 84 L.Ed. 1356, 310 U.S. 554-62 (1940)**; "The deliberate selection in a statute of language differing from that of earlier acts on the subject indicates that a change of law was intended." ***Brewster v. Gage*, 74 L.Ed. 457, 280 U.S. 327-37 (1930)**; "When the wording of an amended statute differs in substance from the wording in the statute prior to amendment, Congress intended the amended statute to have a different meaning." ***Studio Frames Ltd. v. Standard Fire Insurance Co.*, 2005 U.S. Dist. Lexis 39746 (M.D. N.C., August 16, 2005).**

Furthermore, case law has held that (1) changes in statutory language indicate an intent of Congress

to change the meaning of the statute; and (ii) where the words of a later statute differ from those of a previous one on the same or related subject, the Congress must have intended them to have a different meaning ***DirecTV, Inc. v. Michael Brown*, 371 F.3d 814 (11th Cir. 2004)**; quoting (i) ***United States v. NEC Corp.*, 931 F.2d 1493, 1502 (11th Cir. 1991)**, ("[B]ecause changes in statutory language 'generally indicate [] and intent [of Congress] to change the meaning of the statute;'") and (ii) quoting ***Muscogee (Creek) Nation v. Hodel*, 271 U.S. App. D.C. 212, 851 F.2d 1439, 1444 (D.C. Cir. 1988)**, ("Where the words of a later statute differ from those of a previous one on the same related subject, the Congress must have intended them to have a different meaning.").

By applying this rule of statutory construction to FERA, Congress has amended the definition of "specified unlawful activity" and "proceeds" to now have a different meaning which includes "gross receipts." These definitions could not have included "gross receipts" in the pre-amendment money laundering statutes. Furthermore the definitions of "specified unlawful activity" and "proceeds" apply to all of the more than 250 predicate offenses listed in the statutes because the statutes themselves do not, and have never distinguished to which predicate offense they apply.

D. At Least Fifty-One (51) Courts Have Decided Incorrectly The Meaning Of "Proceeds" Contrary To This Courts Holding In *Clark v. Martinez.*

The Supreme Court has the power to make determinations as to the law of the land that binds all courts . . . There are several methods used to ensure that order is maintained within the judicial hierarchy, [and] . . . the Supreme Court, by accepting cases through the discretionary writ of certiorari, has kept order within the courts. The fundamental principal requirement that the federal district courts and the circuit courts of appeal must adhere to controlling Supreme Court decisions is reinforced whenever necessary In ***Hutto v. Davis*, 454 U.S. 370, 375 (1982)**, the Court emphasized the need to adhere to the hierarchal structure of the federal court system by the Constitution and Congress "Unless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower courts no matter how misguided the judges of those courts may think it to be." ***Davis*, 454 U.S. at 375.**

Litman v. Massachusetts Mutual Life Insurance Company*, 825 F. 2d 1506, 1508-09 (11th Cir. 1987) (en banc).** Moreover, since this Court's ***Santos decisions not less than fifty one (51) federal courts have attempted to limit ***Santos*** to its facts, by ignoring this Court's controlling precedent in ***Clark***

v. Martinez, which requires a statutory term to be consistently defined as follows:[3]

1 ***United States v. Garcia-Pastrana*, 584 F.3d 351, 380 (1st Cir. 2009)** (There is some question whether ***Santos*** applies to this case),

2. ***United States v. Bucci*, 582 F.3d 108, 123 (1st Cir. 2009)** ("**18 U.S.C. § 1956(a)** meant 'profits' rather than 'receipts,' at least when the predicate offense is an illegal lottery operation.");

3. ***United States v. Peters*, 2009 U.S. Dist. Lexis 22451 (W.D. N.Y., March 19, 2009)** ("***Santos*** [stands] only for the proposition that 'proceeds' means 'profits' in the narrow circumstances identified by Justice Stevens.");

4 ***Gotti v. United States*, 2009 U.S. Dist. Lexis 6018 (E.D. N.Y., January 28, 2009)** ("***Santos*** . . stands only for the proposition that the money laundering statute does not make criminal the use of the revenue from an illegal gambling operations to pay [it's] expenses.");

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[3] The Petitioner notes that as the Bureau of Prisons' Electronic Law Library, to which he has access generally omits unpublished cases, there is a likelihood there are many more instances of courts disregarding ***Clark v. Martinez***, **supra**, than those which the Petitioner has been able to identify

5 ***United States v. Fleming*, 287 Fed. Appx. 150, 155 (3rd Cir. 2008)** ("[T]he term 'proceeds' includes gross revenues for drug sales.");

6. ***United States v. Jefferson*, 2009 U.S. Dist. Lexis 69525 (E.D. Va., August 8, 2009)** ("[b]ecause ***Santos*** does not establish a binding precedent that the term 'proceeds' means 'profits' except regarding an illegal gambling charge . . ");

7 ***United States v. Okun*, 2009 U.S. Dist. Lexis 12421 (E.D. Va., December 18, 2009)** ("***Santos*** does not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge.");

8 ***United States v. Varnado*, 2008 U.S. Dist. Lexis 86571 (W.D. N.C., October 24, 2008)** ("No matter how the 'receipts' versus 'profits' question is ultimately resolved in light of the plurality opinion . . . ");

9. ***United States v. Howard*, 309 Fed. Appx. 760, 770 (4th Cir. 2009)** ("Because the U.S. Supreme Court in ***U.S. v. Santos*** did not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge. . .");

10. ***McLean v. United States*, 2009 U.S. Dist. Lexis 83691 (W.D. N.C. Charlotte Div., August 27, 2009)** ("[A]n

argument related to 'proceeds' as limited to 'profits' in the mortgage fraud context would have failed under ***Santos***.");

11 ***United States v. Smith*, 2009 U.S. Dist. Lexis 35222 (W.D. Va., April 27, 2009)** ("[R]evenue . cannot constitute 'proceeds' under the money laundering statute [] if the penalties for money laundering are substantially more severe than those for the underlying specified illegal activity"),

12 ***Esposito v. United States*, 2009 U.S. Dist. Lexis 36575 (W.D. N.C., April 2, 2009)** ("Therefore Fourth Circuit precedent that 'proceeds' means 'receipts' except regarding an illegal gambling charge, still stands");

13 ***United States v. Quintanilla-Gonzalez*, Lexis 10359 (5th Cir. 2009)** ("As we have previously explained, the governing definition of proceeds under § 1956 remains unclear even after ***Santos***."),

14. ***United States v. Osuagwu*, 2009 U.S. App. Lexis 25269 (5th Cir. 2009)** ("[T]here was no consensus in ***Santos*** that the definition of 'proceeds' in 1956(a)(1) should be 'profits' with respect to any offenses other than operating an illegal lottery.");

15 ***United States v. Cooks*, 2009 U.S. App. Lexis 25643 (5th Cir. 2009)**

("[N]ot even after ***Santos*** is the law 'clear' on what the prosecution must prove as 'proceeds' ");

16. ***United States v. Bueno*, 2009 U.S. App. Lexis 22756 (5th Cir. 2009)** ("***Santos*** addressed an illegal lottery operation . . This case involves illegal narcotics . . a distinction that makes a difference.");

17 ***United States v. Redd*, 2009 U.S. App. Lexis 2805 (5th Cir. 2009)** (We noted that, "[N]ot even after ***Santos*** is the law 'clear' on what the prosecution should be required to prove as 'proceeds' in [a case involving the illegal sale of prescription drugs],) (alteration in original);

18 ***United States v. Achobe*, 553 F.3d 801 (5th Cir. 2008)** ("***Santos*** may have changed the definition of 'proceeds.' ");

19 ***United States v. Gonzalez*, 2009 U.S. App. Lexis 17473 (5th Cir. 2009)** ("The law governing the definition of 'proceeds' under **18 U.S.C. § 1956** remains unclear after ***Santos***.");

20 ***United States v. Brown*, 553 F.3d 768, 763 (5th Cir. 2008)** ("The precedential value of ***Santos*** is unclear.");

21. ***McDade v. Roy*, 2009 U.S. Dist. Lexis 57283 (E.D. Tex., July 7, 2009)** ("whether the Supreme Court eventually broadens the application of ***Santos*** [beyond

illegal gambling] has no bearing on this case.");

22. ***United States v. Ramos*, 2009 U.S. Dist. Lexis 69834 (S.D. Tex., August 7, 2009)** ("In the absence any such binding authority directing this court to apply ***Santos*** to such a case, the court declines to do so.");

23. ***Garland v. Roy*, 2009 U.S. Dist. Lexis 56334 (E.D. Tex., July 2, 2009)** ("whether the Supreme Court eventually broadens the application of ***Santos*** [beyond illegal gambling] has no bearing on this case.");

24 ***Ghali v. Roy*, 2009 U.S. Dist. Lexis 56331 (E.D. Tex., July 2, 2009)** ("whether the Supreme Court eventually broadens the application of ***Santos*** [beyond illegal gambling] has no bearing on this case ");

25. ***Wilson v. Roy*, 2009 U.S. Dist. Lexis 36957 (E.D. Tex., May 1, 2009)** ("whether the Supreme Court eventually broadens the application of ***Santos*** [beyond illegal gambling] has no bearing on this case ");

26. ***United States v. Sims*, 2009 U.S. Dist. Lexis 35842 (S.D. Tex., April 29, 2009)** ("'***Santos***' does not apply to the money laundering offense at issue in Sims' case."),

27. ***Kenemore v. United States*, 2008 U.S. Dist. Lexis 93172 (E.D. Tex., November 17, 2008)** ("***Santos*** decision does not apply to cases other than those involving illegal gambling.");

28 ***Wannamaker v. United States*, 2009 U.S. Dist. Lexis 106265 (N.D. Tex., Dallas Div., Nov. 10, 2009)** (Noting that "[t]he precedential value of ***Santos*** is unclear outside of the narrow factual setting of that case.");

29. ***United States v. Kratt*, 579 F. 3d 558, 563 (6th Cir. 2009)** ("***Santos*** thus does not require us to apply a 'profits' definition of 'proceeds' to Kratt's offense.");

30. ***Wooten v. Cauley*, 2009 U.S. Dist. Lexis 106921 (E.D. Kentucky, N.D., November 16, 2009)** ("Wooten's conviction did not involve an illegal gambling operation. ***Santos*** therefore does not apply.");

31. ***United States v. Abboud*, 2009 U.S. Dist. Lexis 49562 (N.D. Ohio, May 26, 2009)** ("In reaching its ruling, the Court notes that nearly every court that has considered the issue . . . has rejected an argument that ***Santos*** applies beyond its own facts . . ***Santos*** is limited to . . illegal gambling.");

37. ***Haukedahl v. United States*, 2009 U.S. Dist. Lexis 29409 (N.D. Ohio, April 7, 2009)** ("[***Santos***] is limited by

the plurality to the context of illegal gambling operations and does not apply to the other statutory defined offenses.");

33 ***United States v. Armstrong*, U.S. Dist. Lexis 107262 (E.D. Mich., November 19, 2008)** ("Whether or not . . the term 'proceeds' means 'profits' is for another day");

34. ***United States v. Prince*, 2008 U.S. Dist. Lexis 91265 (W.D. Tenn., November 6, 2008)** ("This Court continues to apply the 'receipts' definition of 'proceeds' [to] Health Care Fraud [cases]." "The Court acknowledges that [this] is in tension with ***Clark v. Martinez***.");

35. ***Pamperin v. United States*, 2009 U.S. Dist. Lexis 85013 (N.D. Iowa, September 16, 2009)** ("Here . . . 'proceeds' means 'gross revenues,' because it is the kind of case involving the sale of contraband."),

36. ***United States v. Quan*, 2009 U.S. App. Lexis 26137 (9th Cir. 2009)** (holding ***Santos*** doesn't apply "[b]ecause there was no such merger problem presented here.");

37. ***United States v. Van Alstyne*, 584 F.3d 803, 2009 U.S. App. Lexis 23330 (9th Cir. 2009)** ("'[P]roceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a merger problem.");

38. ***United States v. Wilcher*, 2009 U.S. Dist. Lexis 89332 (Dist. Az., September 25, 2009)** (holding "that *Santos* does not apply to . . . wire fraud");

39. ***United States v. Zidar*, 2009 U.S. Dist. Lexis 5083 (W.D. Wash., June 17, 2009)** ("*Santos* does not apply in any context other than illegal gambling");

40. ***United States v. Close*, 2009 U.S. Lexis 74146 (Dist. Idaho, August 20, 2009)** ("Close's reliance on *Santos* is misplaced [because] this case [is] based on . . . health care fraud, not an illegal gambling operation.");

41. ***Bhatia v. United States*, 2009 U.S. Dist. Lexis 24815 (N.D. Ca., March 10, 2009)** ("This Court will not extend . . . *Santos* to . . . money laundering convictions . . . which were [not] based on . . . a gambling operation.");

42 ***Gamboa v. Norwood*, 2009 U.S. Dist. Lexis 17926 (C.D. Ca., February 23, 2009)** ("[T]he Court continues to use the Ninth Circuit's definition of the term 'proceeds' in **18 U.S.C. § 1956** as 'that which is obtained . . . by any transaction,'");

43. ***Bull v. United States*, 2008 U.S. Dist. Lexis 100764 (C.D. Ca., Western Div., December 3, 2008)** ("[T]he Court continues to use the Ninth Circuit's

definition of the term 'proceeds' in **18 U.S.C. § 1956** as 'that which is obtained . . by any transaction.'").

44 ***United States v. Orosco*, 2008 U.S. Dist. 575 F. Supp. 2d 1214 (Dist. Colo., July 17, 2008)** ("***Santos*** left Tenth Circuit law undisturbed at least when the underlying SUA is some act other than illegal gambling.");

45 ***United States v. Miller*, 2009 U.S. Dist. Lexis 83260 (Dist. Kan., September 10, 2009)** ("[T]he narrow holding of ***Santos*** is limited to . . . cases . . . which the specified unlawful activity . is illegal gambling ");

46. ***United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009)** ("The narrow holding in ***Santos***, at most, was that the 'gross receipts' of an unlicensed gambling operation were not 'proceeds' under **§ 1956**."),

47. ***King v. Keller*, 2009 U.S. Dist. Lexis 76388 (M.D. Ala., August 25, 2009)** ("Because King's convictions were related to criminal activity other than illegal gambling, the narrow holding of ***Santos*** does nothing to change the state of the law as it relates to King's criminal activity and convictions ");

48 ***Engle v. Eichenlaub*, 2009 U.S. Dist. Lexis 76564 (N.D. Fla., May 24, 2009)** ("[T]he ***Santos*** holding does not apply to

money laundering convictions based on the proceeds of a drug offense.");

49. ***United States v. Kelly*, 2009 U.S. Dist. Lexis 67531 (S.D. Ala., July 9, 2009)** (Follows ***Demarest***: "The narrow holding in ***Santos***, at most, was that the 'gross receipts' of an unlicensed gambling operation were not proceeds under § 1956.);

50. ***Arnaiz v. Hickey*, 2009 U.S. Dist. Lexis 84763 (S.D. Ga., July 9, 2009)** (Holding ***Santos*** does not apply "because the funds that Arnaiz laundered were not gross receipts of an illegal gambling operation ");

51 ***United States v. Durai*, U.S. Dist. Lexis 38763 (Dist. D.C., May 2009)** ("***Santos*** defines 'proceeds' only in the context of an illegal gambling operation ");

In fact, the Petitioner is aware of only one federal case, ***United States v. Hedlund*, 2008 WL 4183958 at *5-6 (N.D. Cal., September 9, 2008)**,[4] that

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[4] Last year, in ***United States v. Hedlund*, 2008 WL 4183958 (N.D. Cal., September 9, 2008)**, Judge Lowell Jenson considered this exact issue and held, pursuant to ***Clark v. Martinez***, that the holding in ***Santos*** applies to all money laundering cases

> [ ] This Court cannot accept the government's argument It does not confront ***Clark v. Martinez***, and its consideration in ***Santos*** The government

(Continued on following page)

expressly applied this Court's controlling precedent in ***Clark v. Martinez*** However, ***Hedlund's*** correct application of controlling law was effectively overruled by the Ninth Circuit's subsequent decision in ***Van Alstyne***, which it decided contrary to ***Clark v. Martinez***.

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appears to be correct that ***Santos*** does not have a common denominator and that the Court should view its ***stare decisis*** effect as limited to the specific result And the government is correct that five of the Justices said that Congress intended that "proceeds" should mean "gross receipts" in drug trafficking cases But the bottom line is that five Justices said that, but they did not vote that The specific result of ***Santos*** is that five Justices voted that "proceeds" means "profits" in **18 U.S.C. § 1956(a)(1)(A)(i)** This decision came about in a case where the SUA was gambling, but the Supreme Court did ***not*** hold that their decision applied "only" to gambling cases To the contrary, Justice Scalia made it very clear that this decision was not to be read as permitting the word "proceeds" to be given different meanings for different applications of the statute Justice Scalia's discussion of ***Clark v. Martinez*** cannot be read in any other way Justice Alito agreed with this position, specifically stating that he did not "see how the meaning of the term 'proceeds' can vary depending on the nature of the illegal activity that produced the laundered funds " [ ] The result of this analysis is that this Court believes that the Supreme Court in ***Santos*** has held that the word "proceeds" in **18 U.S.C. § 1956(a)(1)(A)(i)** means "profits," and that ***Clark v. Martinez*** requires that this meaning must apply to every SUA listed in the statute The further result is that the money laundering conviction of defendant Hedlund must be set aside (Emphasis added)

In light of the fact that the federal courts are now routinely disregarding this Court's controlling precedent in ***Clark v. Martinez*** in alarming numbers, the Petitioner submits that it is now necessary for this Court to reinforce the notion that all federal district courts and courts of appeal must adhere to this Court's controlling decisions by granting this petition and thus acting to prevent the budding anarchy that presently infects the federal judicial system from continuing to expand unchecked.

E. The Federal Courts Of Appeal Are Split Into Four Groups As To The Meaning Of The Term "Proceeds."

Group One:

The Seventh Circuit Court of Appeals holds that "proceeds" always means "profits." **See *United States v. Santos*, 128 S. Ct. 2020**; [T]he word "proceeds" in the federal money-laundering statute, § 1956(a)(1)(A)(i) applies only to transactions involving criminal profits, not criminal receipts . . The meaning of words in a statute cannot change with the statute's application.

Group Two:

The 1st, 4th, 5th, and the 11th Circuit Courts Of Appeal maintains "proceeds" always means "gross receipts," unless the underlying SUA was an illegal gambling operation. **See *United States v. Bucci*, 582 F.3d 108, 123 (1st Cir. 2009)** ("18 U.S C. § 1956(a) meant 'profits' rather than 'receipts,' at

least when the predicate offense is an illegal gambling operation."); ***United States v. Howard*, 309 Fed. Appx. 760, 770 (4th Cir. 2009)** ("Because the U.S. Supreme Court in ***Santos*** did not establish a binding precedent that the term 'proceeds' means 'profits,' except regarding an illegal gambling charge"); ***United States v. Osuagwa*, 2009 U.S. App. Lexis 25269 (5th Cir. 2009)** ("[T]here was no consensus in ***Santos*** that the definition of 'proceeds' in § 1956(a)(1) should be 'profits' with respect to any offenses other than operating an illegal lottery"), ***United States v. Demarest*, 570 F.3d 1232, 1242 (11th Cir. 2009)** ("The narrow holding in ***Santos***, at most, was that the gross receipts of an unlicensed gambling operation were not 'proceeds' under § 1956.");

Group Three:

The United States Court of Appeals for the Third Circuit maintains "proceeds" always means "profits," unless the underlying SUA is drug sales; ***United States v. Fleming*, 287 Fed. Appx. 150, 155 (3rd Cir. 2008)** ("[T]he term 'proceeds' includes gross revenues for drug sales");

Group Four:

The United States Court of Appeals for the Ninth Circuit joined the Sixth Circuit when it decided ***United States v. Van Alstyne*, 584 F.3d 803, 814** (" . . 'proceeds' means 'profits' where viewing 'proceeds' as 'receipts' would present a 'merger'

problem "); ***United States v. Kratt*, 579 F.3d 558, 562 (6th Cir. 2009)** ("'[P]roceeds' does not always mean 'profits,' as Justice Scalia concluded: it means 'profits' only when the § 1956 predicate offense creates a merger problem. . . .")

The Sixth Circuit interpreted ***United States v. Santos*, supra**, as holding that "proceeds" is profits in federal money laundering statutes when: (i) there is no legislative history to the contrary; and (ii) a perverse statutory maximum sentencing merger effect would otherwise occur. Judge Sutton wrote:

> If "proceeds" has the same meaning in §§ 1956 and 1957, and if ***Santos*** reversed a § 1956 conviction, does that require us to vacate Kratt's § 1957 convictions? No. In this case, it is clear, a merger issue arises because nearly every consumated bank fraud and false statement offense involves depositing, withdrawing, transferring or exchanging funds derived from the offense. **See 18 U.S.C. § 1957.** But it is not the kind of merger that troubled Justice Stevens. Neither a § 1956 nor a § 1957 conviction radically increased the statutory maximum sentence when the predicate offense is bank fraud or making false statements. Far from it: § 1956 and 1957 impose lower statutory maximums than bank fraud and false-statement offenses. **See 18 U.S.C. § 1956(a)(1) (20 years); Id. § 1957(b)(1) (10 years); Id. § 1014 (30 years).** Because Kratt's § 1957 convictions does not subject him to a markedly increased, statutory maximum, there is

no reason to consider whether the legislative history shows that Congress contemplated, and intended, such an outcome **See n.1.**

Santos thus does not require us to apply a profits definition of "proceeds" to Kratt's offenses. That leaves us with our prior precedents in this area, which apply in a gross-receipts definition. **See *Prince*, 214 F.3d at 748; *Haun*, 90 F.3d at 1101**, and which support this conviction

CONCLUSION

The Sixth Circuit Court of Appeals erred when after deciding that this case did not involve any "profits" and it· (i) found the term "proceeds" has different meanings, i.e., "**gross receipts**" for one offense and "**profits**" for another, depending on the application of the money laundering statute, and (ii) in ***Kratt***, found the term "proceeds" meant "gross receipts" for the following reasons:

A. Even the narrowest interpretation of ***Santos*** at a minimum, holds the meaning of the term "proceeds" when used in the context of the federal money laundering statutes, where the SUA is an illegal gambling operation is "profits," not "gross receipts" ***Clark v. Martinez*** consequently requires that the same definition of "proceeds" be applied to each of the more than two-hundred-fifty (250) predicate offenses listed in the money laundering statutes.

B. The Government's own Congressional testimony concedes that the ***Santos*** "profits" interpretation of "proceeds" applies to fraud cases

C. Congress' passage of FERA demonstrates that the pre-amendment money laundering statutes ***excluded*** "gross receipts" when defining "proceeds."

Consequently it is indisputable that the Sixth Circuit Court of Appeals decided this case contrary to this Court's controlling precedent in ***Clark v. Martinez*, supra**.

Additionally, this Court may wish to grant this petition to maintain order in the federal judicial system for the following reasons:

A. At least **fifty one (51)** courts have decided incorrectly the meaning of "proceeds" contrary to this Court's holding in ***Clark v. Martinez***

B. The federal courts of appeal are split into four groups as to the meaning of the term, "proceeds"

This Petitioner submits that it would be most appropriate for this Court to grant Certiorari to maintain order in the federal judicial system, and to provide the Petitioner with the benefit of this Court's controlling precedent, that he is unquestionably entitled to, requiring that "proceeds" be defined as "profits" in this case and reversing his conviction

Dated: March 9, 2010

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

File Name: 09a0318p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *v.* FRED KRATT, *Defendant-Appellant.*	Nos 08-5831/5832

Appeal from the United States District Court
for the Western District of Tennessee at Memphis
No. 05-20368-001 – J. Daniel Breen, District Judge.

Argued: August 4, 2009

Decided and Filed: September 2, 2009

Before CLAY and SUTTON, Circuit Judges;
THAPAR, District Judge.*

COUNSEL

ARGUED: Karimbumkara Jayaraman, LAW OFFICES, Memphis, Tennessee, for Appellant. Timothy

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* The Honorable Amul R Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation

R. Discenza, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee. **ON BRIEF:** Karimbumkara Jayaraman, LAW OFFICES, Memphis, Tennessee, for Appellant. Timothy R Discenza, ASSISTANT UNITED STATES ATTORNEY, Memphis, Tennessee, for Appellee.

SUTTON, J , delivered the opinion of the court, in which THAPAR, D.J., joined. CLAY, J (pp. 13-14), delivered a separate opinion concurring in the judgment

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OPINION

SUTTON, Circuit Judge. Fred Kratt challenges his conviction for three counts of engaging in monetary transactions in criminally derived property, *see* 18 U.S C. § 1957, and an $85,954 restitution order. We affirm.

I.

In June 2001, Kratt re-financed his Cessna airplane by obtaining a $301,535 loan from Bancorp South based on fraudulent income tax returns that inflated his adjusted gross income for 1999 and 2000. The bank received a security interest in Kratt's Cessna as collateral. When Kratt fell behind on his payments, the bank foreclosed on the plane, selling it for $210,700 in October 2003. The sale left an $86,137

deficiency on the loan. On December 29, 2003, Kratt obtained an unsecured loan from Bancorp South for $86,137, which the bank applied to the first loan two days later That brought the first loan to a zero balance and allowed Bancorp South to release its security interest in the Cessna

Kratt did little better in paying off the second loan. He made six payments between March and August 2004, only one of which (for $1546) made any dent in the principal Bancorp South charged off the second loan in August 2004, which had a final balance of $85,945. Kratt declared bankruptcy in 2005 and discharged his debts, transforming the final loan balance into a permanent loss for the bank.

A grand jury indicted Kratt on one count of bank fraud, *see* 18 U.S.C § 1344, one count of making a false statement on a loan application, *see id* § 1014, three counts of engaging in monetary transactions in criminally derived property, *see id.* § 1957, and two counts that have no bearing on this appeal. At trial, the Government showed that Bancorp South deposited the proceeds of the $301,535 initial loan into Kratt's account through two separate deposits. one for $274,712 48 and one for $25,287.52. A jury convicted Kratt on all seven counts. The district court imposed a 46-month sentence, and it ordered Kratt to pay Bancorp South $85,945 in restitution

II.

A.

Section 1957 criminalizes "knowingly engag[ing] . . in a monetary transaction in criminally derived property of a value greater than $10,000" if the underlying criminal offense was one of over 250 enumerated offenses, including bank fraud and making false statements on a loan application. 18 U.S.C. § 1957(a), *see also id.* §§ 1956(c), 1957(f)(3). "[C]riminally derived property," the statute adds, "is any property constituting, or derived from, *proceeds* obtained from a criminal offense." *Id.* § 1957(f)(2) (emphasis added).

The question raised by Kratt's appeal is this: Does "proceeds" mean profits or gross receipts? Put another way, did the Government have to establish the gross receipts Kratt received from the fraudulently obtained loans (*viz.*, the full $301,535 amount of the loans and the resulting $274,712 48 and $25,287.52 deposits) or did it have to establish the profits Kratt received from the fraudulently obtained loans (*viz.*, the net profits from the loan and deposits)? If "proceeds" means profits, as Kratt argues, the Government has a sufficiency-of-the-evidence problem, because it never proved that the money Kratt deposited into, and withdrew from, his Bancorp South account represented the profits, as opposed to the gross receipts, of his bank fraud or false statements. If "proceeds" means gross receipts, as the Government argues, Kratt does not have a leg to stand on in challenging these convictions on sufficiency grounds.

At the time of trial, case law suggested that "proceeds" means gross receipts, because our precedent included gross receipts within the definition of proceeds under 18 U.S C. § 1956, a companion statute to § 1957. *See United States v. Prince,* 214 F.3d 740, 747 (6th Cir. 2000); *United States v Haun,* 90 F 3d 1096, 1101 (6th Cir. 1996) Since then, however, the Supreme Court has held that "proceeds" means profits in the context of an illegal-gambling operation under § 1956. *See United States v. Santos,* ___ U S ___, 128 S. Ct. 2020, 2025 (2008). In the aftermath of *Santos,* we must answer three questions: (1) Does "proceeds" have the same meaning under §§ 1956 and 1957, which both use "proceeds" in defining the elements of the offenses, *see* 18 U.S.C. §§ 1956(a)(1), 1957(f)(2); (2) what does the Court's 4-1-4 decision in *Santos* stand for; and (3) does that holding require us to reverse Kratt's conviction?

Does "proceeds" under § 1957(f)(2) have the same meaning as "proceeds" under § 1956(a)? Yes. Congress enacted §§ 1956 and 1957 at the same time as part of the Money Laundering Control Act of 1986 – in truth as *all* of the Act because the twin statutes amount to the entirety of the legislation. *See* Pub L No. 99-570, Title XIII, § 1352, 100 Stat 3207-21. "[T]he normal rule of statutory construction" under these circumstances is "that identical words used in different parts of the same act are intended to have the same meaning" *Gustafson v Alloyd Co*, 513 U.S 561, 570 (1995).

It makes particular sense to follow that custom here because the two statutes cover the same subject matter in a common way. *See Barnhart v. Walton,* 535 U S. 212, 221 (2002); *Comm'r v. Lundy,* 516 U.S. 235, 249-50 (1996). The statutes criminalize similar acts – monetary transactions in criminal proceeds – and simply do so from slightly different angles· Section 1956 criminalizes classic money laundering, while § 1957 criminalizes moving around at least $10,000 in criminal proceeds for any purpose through a financial institution. The statutes cover the same predicate offenses – more than 250 of them. *See* 18 U S C. §§ 1956(c)(7), 1957(f)(3) And whether we define "proceeds" to refer to profits or gross receipts, both statutes would remain coherent and would contain no redundant provisions. *See Santos,* 128 S. Ct. at 2025 Given these similarities, there is no reason to define "proceeds" differently from one provision to the next

What does Santos hold? The defendant in *Santos* operated an illegal lottery in Indiana and was convicted of running an illegal gambling business and money laundering. *Id* at 2022-23 Santos launched a successful collateral attack on his money-laundering convictions under 28 U.S C. § 2255, arguing that "proceeds" in § 1956 means profits, not gross receipts, and that the Government had not proved that the transactions underlying his convictions involved the profits of his illegal gambling business. *Id* at 2023. The Supreme Court's 4-1-4 decision lays out three different ways to interpret "proceeds."

Writing for a four-Justice plurality, Justice Scalia reasoned that "proceeds" always means profits under § 1956. *Santos,* 128 S. Ct. at 2025. Dictionary definitions of proceeds, the term's use throughout Title 18 and the statutory context of § 1956, he explained, all failed to resolve the matter, because each interpretation was as plausible as the other. *Id.* at 2024-25. The plurality therefore invoked the rule of lenity and adopted the more defendant-friendly definition: "[P]roceeds" means profits. *Id.* at 2025.

Applying the rule of lenity was particularly appropriate, the plurality added, because defining proceeds as gross receipts would create a "merger problem" for a number of predicate offenses under § 1956. "[N]early every violation of" a number of predicate offenses listed in § 1956(f)(3), it turns out, also violate "the money-laundering statute," and money laundering sometimes "radically increases" the statutory maximum sentence compared to the merged offense *Id* at 2026. In *Santos* itself, for example, operating an illegal lottery had a statutory maximum of five years, while a § 1956 conviction raised the statutory maximum to 20 years *See id* at 2027; 18 U S.C. §§ 1955(a), 1956(a)(1)

Justice Alito, writing for four Justices in dissent, reached the opposite conclusion, noting that the primary definition of "proceeds" was gross receipts, that this interpretation made sense in the context of this and related statutes and that accordingly § 1956 always encompasses gross receipts. *See Santos,* 128 S. Ct at 2037 (Alito, J., dissenting) In his view, the

rule of lenity had no place in the analysis because the context in which "proceeds" appeared suggested that it referred to gross receipts. *See id.* at 2036-37, 2045 Acknowledging that his interpretation created a merger problem, he responded that the answer was not to alter the statutory meaning of "proceeds" but to resolve any such problems at sentencing or, if necessary, through amendments to the sentencing guidelines. *See id.* at 2044

Justice Stevens, writing for himself, concurred in the judgment in favor of Santos, but he rejected the always-the-one or always-the-other approaches offered by his colleagues As he saw it, the meaning of "proceeds" in § 1956 varies depending on the underlying predicate offense: While "proceeds" means profits if the laundered funds derived from operating an illegal lottery, it might mean gross receipts if the laundered funds derived from distributing cocaine *See id.* at 2031-32 (Stevens, J., concurring in the judgment). Two factors drove Justice Stevens' assessment of how to apply the provision in various settings and his ultimate decision to apply a profits definition to Santos. One, defining "proceeds" as profits when the predicate offense is operating an illegal lottery created a "merger problem" that "radically increase[d] the sentence for that crime" and led to a "perverse result" that "Congress could not have intended." *Id* at 2033. Two, nothing in the legislative history of § 1956 suggested that Congress was aware of this problem and yet still chose to treat "proceeds" as gross receipts when the laundered funds derive from

operating an illegal lottery *Id.* Under these circumstances, Justice Stevens concluded, the rule of lenity tipped the scale in favor of defining "proceeds" as profits when the predicate offense is operating an illegal lottery. *See id* at 2033, 2034 n.7.

Because no opinion in *Santos* attracted a majority of Justices, the "position taken by those [Justices] who concurred in the judgment[ ] on the narrowest grounds" represents its holding. *Marks v. United States,* 430 U.S. 188, 193 (1977). That is easier said than done. Sometimes it is possible to identify the concurring opinion that "is a logical subset" of the other opinion (or opinions). *King v Palmer,* 950 F 2d 771, 781 (D.C. Cir. 1991) (en banc); *see also Triplett Grille, Inc v. City of Akron,* 40 F 3d 129, 134 (6th Cir. 1994). And sometimes it is not, making *Marks* an exercise in chasing the wind *Compare Triplett Grille,* 40 F.3d at 134-35, with *Anker Energy Corp v. Consolidation Coal Co.,* 177 F 3d 161, 170 (3d Cir. 1999). Imagine, for example, if Justice Stevens had held that proceeds always means gross receipts absent both factors he identifies. It would be no more appropriate to call that approach "a logical subset" of Justice Scalia's than to call Justice Scalia's approach "a logical subset" of Justice Stevens'.

Yet there is a coherent way to apply *Marks* here. Justice Stevens' approach provides a logical subset of Justice Scalia's approach – at least in terms of outcomes. "[P]roceeds" does not always mean profits, as Justice Scalia concluded; it means profits only when the § 1956 predicate offense creates a merger problem

that leads to a radical increase in the statutory maximum sentence and only when nothing in the legislative history suggests that Congress intended such an increase. Whenever a predicate offense satisfies this narrow rule, the Justices in the plurality would hold "proceeds" means profits as well, because they would define "proceeds" as profits for every predicate offense.

Resisting this conclusion, the Government maintains that *Santos* stands only for the proposition that "proceeds" means profits when the predicate offense is operating an illegal lottery Because the plurality and Justice Stevens cannot agree on whether "proceeds" has a single meaning under § 1956 or a meaning that varies across distinct predicate offenses and because the reasoning of the opinions is irreconcilable, the Government reasons, the two opinions taken together stand only for the outcome in *Santos,* nothing more. But fundamental disagreements about how to interpret a statute do not necessarily destroy a subset-superset relationship between the two opinions Otherwise, *Marks* would stand for little, as it generally will be the case that the legal reasoning of the plurality opinion and the legal reasoning of the concurring opinion(s) will differ. That is often why Justices (and judges) write separately in the first place. No matter how strongly the plurality may disagree with Justice Stevens' interpretive approach, his holding, though not all of his dicta, "will necessarily produce results" they agree with. *Triplett Grille,* 40 F.3d at 134 (internal quotation marks omitted) This

is not a case, by way of contrast, in which the plurality opinion turned on statutory interpretation and the concurring opinion turned on constitutional interpretation, *see, e.g., Welsh v. United States,* 398 U.S. 333 (1970), a situation that generally would not be amenable to a *Marks* analysis.

That said, we must acknowledge two unsatisfying aspects of this approach. It will require us to define "proceeds" for over 250 predicate offenses, *see* 18 U.S.C. §§ 1956(c), 1957(f)(3), a regime that may generate a cottage industry of *Santos* litigation for years to come. And it will create a more severe notice/rule-of-lenity problem than the one that predated *Santos.* Even after accounting for Justice Scalia's and Justice Stevens' opinions, "proceeds" remains an ambiguous term, but it is now one that the lower courts will place in one camp or the other based on an offense-by-offense inquiry that even the most law-abiding, prescient and lawyerly citizen would find hard to predict. Oddly enough, then, the rule of lenity considerations that drove *Santos* have greater force today than they did before the Court decided *Santos.* Yet a straightforward application of *Marks* requires us to apply a *defendant-unfriendly* approach to Kratt, and that is what we have done.

One other word on applying *Santos.* In some settings, a merger problem may exist under § 1956 but not under § 1957. Operating an illegal lottery, for example, likely falls in this category because most illegal lottery transactions involve less than $10,000 and many illegal lottery operators want to avoid the

increased IRS and FBI scrutiny that comes with over-$10,000 monetary transactions through financial institutions. *See* 31 U S.C §§ 5313, 5324; 31 C.F R. §§ 103.18, 103.22. Likewise, a conviction under § 1956, but not under § 1957, may lead to a radical increase in the statutory maximum. Because "proceeds" has the same meaning under both §§ 1956 and 1957, we must consider whether contrary legislative history, a merger problem or a radical increase in the statutory maximum exists under *either* §§ 1956 or 1957 when applying *Santos*. If the *Santos* rule applies under either statute, then "proceeds" means profits for both statutes.

If "proceeds" has the same meaning in §§ 1956 and 1957 and if Santos reversed a § 1956 conviction, does that require us to vacate Kratt's § 1957 convictions? No In this case, it is clear, a merger issue arises because nearly every consummated bank fraud and false statement offense involves depositing, withdrawing, transferring or exchanging funds derived from the offense. *See* 18 U S C. § 1957. But it is not the kind of merger that troubled Justice Stevens. Neither a § 1956 nor a § 1957 conviction radically increases the statutory maximum sentence when the predicate offense is bank fraud or making false statements Far from it Sections 1956 and 1957 impose *lower* statutory maximums than bank fraud and false-statement offenses. *See* 18 U.S C. § 1956(a)(1) (20 years); *id* § 1957(b)(1) (10 years); *id* § 1344 (30 years); *id* § 1014 (30 years). Because Kratt's § 1957 conviction does not subject him to a markedly increased statutory maximum, there is no reason to consider whether the legislative history shows that Congress contemplated, and intended, any such outcome

Santos thus does not require us to apply a profits definition of "proceeds" to Kratt's offenses. That leaves us with our prior precedents in this area, which apply a gross-receipts definition, *see Prince,* 214 F.3d at 748, *Haun,* 90 F.3d at 1101, and which support this conviction Kratt does not contest that the two deposits and one withdrawal from his Bancorp South account involved the gross receipts of his bank fraud and false statement offenses. Accordingly, sufficient evidence supports Kratt's conviction on three counts of engaging in monetary transactions in criminally derived property.

That leaves an alternative ground for decision raised by the Government – a variation on which the concurrence embraces. In the last paragraph of its brief addressing these § 1957 convictions, the Government says the following, quoted in full:

> The United States would further submit that even if *Santos* were applicable to the instant case, the transactions involved in counts 4, 5 and 6 of indictment 05-20368, that is, count 4 being a check for $20,000 00, the deposit mentioned in count 4 of $25,287 52, and the deposit in count 6 of $274,712 48 were in fact the net proceeds of the sum loaned which was received by the defendant as a result of his fraudulent activity The fact that the defendant may have had greater liabilities than these loans, is irrelevant, as these liabilities do not pertain to any sentence inquired as a result of his fraudulent application for the loans. To extend the holding in

> *Santos* further than that, would to be put any court in the impossible position of proving a defendant's total financial picture to determine whether a specific criminal activity increased the defendant's solvency in matters unrelated to the activity.

Appellee Br. at 18-19.

If we understand the Government correctly, it is arguing that, "even if Santos" required us to adopt a "profits" definition of "proceeds," it still would win. In other words, under any interpretation of "profits," these transactions exceeded the $10,000 statutory minimum set forth in § 1957. The first answer to this argument is that the predicate for reaching it does not exist. We have held that proceeds means gross revenues, not profits, so there is no basis for reaching the Government's alternative theory of affirmance.

The second answer is that the Government did nothing to prove to the jury that the deposits and withdrawal represented the *profits* of Kratt's crimes and of course the jury was never instructed on the point. We cannot relieve the Government of its burden of proof on an essential element of a crime whenever we believe it might satisfy it *Cf United States v. Gaudin*, 515 U.S. 506, 510, 514-15 (1995).

The third answer is that the definition of profits is far from self-evident. We can envision at least four definitions of profits in this setting: (1) the gross receipts of the fraudulently obtained loan; (2) the gross receipts of the loan minus the value of the security

interest at the time of the loan, (3) the gross receipts of the loan minus the principal repaid and the amount recovered from liquidating the collateral or (4) the gross receipts of the loan minus the non-profit-generating uses of the loan proceeds, such as debt repayment. We agree with the concurrence that the last definition is unlikely. But no authority excludes the second definition, and under that definition Kratt obtained no profit from the loan He received a $301,535 loan but gave the bank a $301,535 security interest in a Cessna valued at $350,000.

We also agree with the concurrence that "[t]he more prudent course" is invariably "to wait to consider . . . issues in a case where they are properly raised by the parties." Concurrence at 2 n.1. But, with respect, that is what we have done. At Kratt's trial, the parties and district court assumed (based on existing Sixth Circuit law) that "proceeds" means gross revenues. On appeal, both parties squarely debated – that indeed is all they squarely debated – whether *Santos* changes Sixth Circuit law Kratt said it did, the Government said it did not; and we refereed the dispute, holding that *Santos* does not change Sixth Circuit law in a way that benefits Kratt The parties, by contrast, never debated the meaning of "profits," Kratt never offered a definition of the term and the Government's apparent alternative argument never mentions (or purports) to define "profits " In short, the issue we have decided – the effect of *Santos* on Sixth Circuit law – was the one question properly presented by the parties with respect to the § 1957 convictions

B

Kratt separately challenges the district court's $85,945 restitution order, *see* 18 U.S.C. § 3663A, claiming it exceeds Bancorp South's losses from the bank fraud and false statements A "victim of the offense," the statute says, is "a person directly and proximately harmed as a result of the commission of" the offense, *id.* § 3663A(a)(2), and the Government must prove the bank's loss by a preponderance of the evidence, *see id* § 3664(e); *United States v. White,* 492 F.3d 380, 418 (6th Cir. 2006). In calculating restitution, "the loss caused by the conduct underlying the offense of conviction establishes the outer limits of a restitution order" *Hughey v. United States,* 495 U S. 411, 420 (1990); *see also United States v. Sosebee,* 419 F.3d 451, 459 (6th Cir. 2005).

In this instance, Bancorp South's $85,945 loss stemmed directly and proximately from Kratt's bank fraud and false statements Had Bancorp South charged off the deficiency balance on the first loan, they would have suffered a loss of $86,137 due to the fraud. But instead the bank tried to mitigate the loss by rolling the deficiency balance into a new loan so Kratt could continue paying the balance down, a required course of action because the bank needed to get the first loan off its books so it could release its security interest in the foreclosed and resold Cessna. When this mitigation strategy failed seven months later, Kratt still owed $85,945 on the second loan. Because Bancorp South's sole motivation for issuing the second loan was to mitigate its losses on the first

loan (and to release the security interest in the Cessna), the $85,945 amount arose directly and proximately from Kratt's fraudulent conduct

Noting that the first loan was paid in full (on paper anyway) and that no fraud occurred in connection with the second loan, Kratt maintains that the second loan represents unrelated conduct that severs any link between the $85,945 loss and the bank fraud and false statements Yet Kratt offers no evidence showing, or even hinting, that Bancorp South would have approved the second loan but for its losses on the first one And the record contains several pieces of evidence, including uncontradicted testimony, supporting the Government's allegations: The second loan was for the exact amount of the outstanding balance on the first loan; it was issued by the same bank that issued the first loan two months after it sold the collateral underlying the first loan due to default; and the bank applied the proceeds to the first loan within two days of origination. This evidence amply satisfies the Government's preponderance burden.

III

For these reasons, we affirm

CONCURRING IN THE JUDGMENT

CLAY, Circuit Judge, concurring in the judgment. According to the majority, Kratt's appeal requires us to determine whether the term "proceeds" in 18 U.S.C. § 1957(f)(2) means "profits" or "gross receipts." The majority insists that resolving this question is necessary because. "If 'proceeds' means profits, as Kratt argues, the government has a sufficiency-of-the-evidence problem, because it never proved that the money Kratt deposited into, and withdrew from, his Bancorp South account represented the profits, as opposed to the gross receipts, of his bank fraud or false statements If 'proceeds' means gross receipts, as the government argues, Kratt does not have a leg to stand on in challenging these convictions on sufficiency grounds." I disagree Notwithstanding the majority's unsupported suggestion to the contrary, it is evident that Kratt's claims would fail even if the term "proceeds" means "profits."

As the government properly points out, the money that Bancorp South placed in an account for Kratt and that Kratt withdrew from that account constitutes profits regardless of whether he used those illegally obtained funds to pay off other loans As the majority explains, Kratt obtained this loan from Bancorp South to refinance another loan related to a Cessna aircraft There is no question that Kratt's Cessna loan was not a critical part of his criminal

activity, it was a personal debt. On any reading, the Supreme Court's decision in *United States v. Santos*, ___ U.S ___, 128 S. Ct. 2020 (2008), does not suggest – and cannot possibly be read to suggest – that the proceeds from an illegal act must be greater than the total of the defendant's outstanding personal debts to constitute "profits." In *Santos*, the Court considered whether the receipts of an illegal lottery *that were being funneled back into the operation* were in fact "proceeds" for purposes of § 1956. In this case, however, Kratt undoubtedly did not use of [sic] the proceeds from his illegal conduct to help finance his illegal conduct. Despite Kratt's contention, and notwithstanding the majority's acceptance of that suggestion, this case is nothing like *Santos*, and presents none of the legal nuances at issue there. Properly understood, Kratt's Cessna loan was the *motivation* for his illegal activity, not the *means* by which he carried it out. The fact that Kratt had debts and other financial obligations that he intended to pay off with his misbegotten loan is irrelevant. To read *Santos* more broadly would put prosecutors in the impossible position of having to prove that defendants were not using the proceeds of their criminal conduct to pay off their mortgages, or student loans, or car insurance, etc.

The simple fact is that Kratt did not use the proceeds of his fraudulent scheme to promote the illegal operation that generated those funds. Consequently, even if we accept *arguendo* Kratt's arguments, his sufficiency-of-the-evidence claim would still fail. Even assuming that *Santos* applies, and on

any interpretation of *Santos*, the proceeds of Kratt's loan were profits that undoubtedly exceeded the $10,000 statutory minimum set forth in 18 U.S.C. § 1957(a). Because Kratt's claim fails in any event, we need not consider whether the term "proceeds" has the same meaning in § 1957 cases as the Supreme Court held it does in certain § 1956 cases, nor do we need to determine the proper scope of the Court's decision in *Santos*. Resolving these questions is not necessary to our disposition of this case.[1]

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[1] The majority seems to acknowledge that the proceeds of a fraudulently obtained loan are "profits," not merely receipts, even if the defendant uses the proceeds to pay down his or her personal debt. Nevertheless, the majority insists that we must address these legal questions because some of the underlying assumptions of the government's "alternative theory of affirmance" are flawed and because the majority can "envision" other possible definitions of "profits" in this context. The majority's reasoning is flawed on both accounts. Indeed, the whole point of accepting Kratt's argument *arguendo* is that we need not resolve whether proceeds means gross revenues or profits in this context, so the majority's suggestion that we "have held that proceeds means gross revenues, not profits, so there is no basis for reaching the Government's alternative theory of affirmance" is utterly flawed. And although the alternative definitions offered by the majority are interesting suggestions, Kratt does not make any of these arguments. On the contrary, Kratt argues *only* that "[t]he money received as a result of the named offenses were not 'profits' of a criminal enterprise, but rather funds which were used for the specific purpose of refinancing the airplane." Appellant Br. at 21. Nowhere does Kratt ever suggest that the receipts of his Bancorp South loan are not profits because they were secured with offsetting collateral, or offer anything resembling the majority's second alternative definition of "profits." Because the majority seems to acknowledge that the fourth definition is

(Continued on following page)

I therefore concur in the judgment but not in the opinion offered by the majority.

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unacceptable, and that is the *only* definition offered by Kratt, I do not see any reason to reach any further Because Kratt failed to make the argument that follows from the second definition "envision[ed]" by the majority, I see no reason to make it for him simply to manufacture a justification for reaching an issue of first impression in this circuit The more prudent course would be to wait to consider such issues in a case where they are properly raised by the parties, especially in this context where there may be nuances to these types of financial transactions that have not been discussed by the parties Simply because we can "envision" alternative definitions does not mean that we need to address them

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, VS. FRED KRATT, Defendant.	No. 05-20368/05-20080

TRANSCRIPT OF SENTENCING
BEFORE THE
HONORABLE J. DANIEL BREEN

JUNE 17, 2008

[8] where we go from there.

MR. FARESE: Thank you, Your Honor

May it please the court, Your Honor, secondly, the defendant would respectfully submit – And, Your Honor, this is not contained in our written objections because I'm not sure of this at this time, but I want to preserve it for the defendant The defendant has asked that I preserve this; that it may very well be that concerning the car loans and concerning the mortgage allegations, it may very well be that the statute of limitations had run on some or all of those counts. I'm just stating that, Your Honor. That will be for appellate purposes, and I've explained that to the defendant But he wanted me to state that today.

Your Honor, the next issue that I would like to address is the amount of money that is used within the calculation for the bank mortgage charges. Your Honor, these are the charges that he was convicted on concerning filing – excuse me – submitting false income tax returns on which the loans and the application was granted on those loans. May it please the court, number one, is we don't believe that the money laundering schedule, the accumulated amount of these loans should be used to calculate his offense level that I believe he's gotten a 20-point enhancement on the amounts. And the [9] reason for that is that the underlying substantive count of mail fraud and false application is a constituent part of this offense. In other words, he submits, according to the proof, he submits, according to the proof, a false income tax, one or two false income tax returns, and that application at that time is made out and then later the money is transferred into the accounts in the ordinary course of business like any other loan. But this being a constituent part of the offense added with the fact that these mortgage holders lost no money, they were paid back. Everything was paid back except for the very last loan that Mr Kratt took out which was not part of the indictment.

MR. DiSCENZA: That's not true.

MR. FARESE: Excuse me? I'm sorry?

MR. DiSCENZA: I'm sorry I was talking to my agent.

THE COURT: It is picking you up.

MR. DiSCENZA: I'm sorry.

THE COURT: It's picking you up, so be careful.

MR. FARESE: I'm sorry. I thought you were talking to me

MR. DiSCENZA: I was talking very quietly. It is picking it up, I'm sorry,

[10] **MR. FARESE:** I apologize to you, Mr DiScenza.

Your Honor, from my information, from what I received and from the loan numbers that I've looked at and the documentation that we provided to the presentence investigator, it is my belief that the last loan, and I'm talking about the bank mortgage charges, the last loan which was approximately $86,000 when taken out but reported to the probation service as being $85,000 and change as loss was not part of the charged offenses. And if I'm mistaken on that, I'm not trying to pull the wool over anyone's eyes. That is my belief. So I believe that was the last loan that was taken out by the defendant with BancorpSouth.

But in any event, Your Honor, the total amount of the loans should not be calculated in his offense level because it's my belief that they are encompassed it within the mail fraud count itself

THE COURT: I may not be quite understanding exactly where you are coming from, Mr

Farese, but of course the calculation that had been submitted by the presentence report reflects under the 2S1.1, guideline, particularly under (a)(2) would have a base offense of eight and then going to the 2B1 1 deals with an enhancement based upon the amount of funds that were allegedly involved. So I guess I'm not following what [11] you are saying here. There may – The money laundering may have involved various loans, but in order to get the enhancement, you've got to look at the amount of the alleged loss that's involved, which under 2B1.1B(g) is where it picks up the additional 12 levels, I guess.

MR. FARESE: And I misstated when I said 20 levels while ago, Your Honor I was using the base plus the 12, and I misspoke on that. Your Honor, what I'm arguing is this; there was no loss

THE COURT: I understand that point, but it seemed to me you were saying, well, in addition to that, that somehow it already is encompassed in the money laundering, and I don't think that's the case because that's where the enhancement comes from.

MR. FARESE: Right, and, Your Honor, I was arguing that.

THE COURT: Okay

MR. FARESE: I was arguing that. I may be in error, but you heard me correctly

THE COURT: Okay.

MR. FARESE: All right. So, Your Honor, and what I'm arguing based on as I looked at the recent Santos and Diaz decision, that's where, that's where I came up with that argument. And the reason for that is, Your Honor, for years the government has used the money [12] laundering statute as a catch-all and as a tool of their enforcement of the law. But what I'm saying, Your Honor, and I'm trying to preserve this point also, and it may be better argued in an appellate setting, is that I don't believe this was money laundering at all is what I'm saying. And the court will rule however the court rules, but that's our position on that. The only thing that can be shown as a loss, even if you count in the last loan to Bancorp-South, which they reported to have a loss of $85,000 and change, that's the only known loss in this matter to my knowledge

THE COURT: Mr. DiScenza?

MR. DiSCENZA: I'm sorry, I didn't follow that argument at all Money laundering doesn't have anything to do with loss It has to do with the conducting of a monetary transaction with the proceeds of a specified unlawful activity The jury was charged that. They found guilty verdicts on that. The amounts of the transactions are very liquidated. There is nothing to interpretation. They are specific checks that went in and out of the bank accounts. So really loss has nothing to do with it I will say also counsel is very inaccurate when he says there was no loss. It's just not true. As an example the way –

THE COURT: Push that away from you. I'm [13] sorry, We are going to get somebody up here to help with that. I'm sorry.

MR. DiSCENZA: I mean it's not factually correct. If he wants to put on proof, that's great, but it's not factually correct. The loss he's talking about, the $86,000 loss I think that was the Cessna loan, and it's true it was refinanced with another – they declared it a deficiency, they wrote it off. Mr Kratt then attempted, in order to have that deficiency wiped out, to borrow or assume that deficiency with another loan, which again was not paid off. So that was – It is a loss, but it really doesn't matter That's not what money laundering is Money laundering has nothing at all to do with the loss of the financial institutions.

THE COURT: Are you anticipating or planning to present any proof on the issue?

MR. DiSCENZA: I will if he wants to maintain that there wasn't any loss I don't think it makes any difference If the court thinks that makes a difference, I'll be glad to present proof on it, but it doesn't make any difference.

THE COURT: I agree that – I agree with you, at least at the outset, that in order to be found guilty of the offense which he is charged doesn't require to show those losses, but there is in the assessment, I [14] guess, of the number of levels, the offense level, according to the PSR, that there was – the value of the laundered funds were in a certain range. And that's where the 12 levels goes in terms of

getting to the 20, to the level 20 based on my understanding of the way the calculations are set up. And that's set forth according to the PSR in paragraph 40 of the PSR

* * *

Nos 08-5831/5832

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
Plaintiff-Appellee,	)	ORDER
v	)	(Filed Oct 26, 2009)
FRED KRATT,	)	
Defendant-Appellant.	)	

BEFORE. CLAY and SUTTON, Circuit Judges; and THAPAR,* District Judge.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases Accordingly, the petition is denied

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* Hon Amul R Thapar, United States District Judge for the Eastern District of Kentucky, sitting by designation

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green
Clerk